No. 85-1530

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WILLIAM E. BROCK, SECRETARY OF LABOR, AND ALAN C. McMILLAN, REGIONAL ADMINISTRATOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,

Appellants,

v.

ROADWAY EXPRESS, INC.,

Appellee.

On Appeal from the United States District Court for the Northern District of Georgia

BRIEF FOR CENTRAL OHIO COAL COMPANY, CONSOLIDATION COAL COMPANY, EASTERN ASSOCIATED COAL CORP., SOUTHERN OHIO COAL COMPANY, U.S. COAL, INC., and WINDSOR POWER HOUSE COAL COMPANY AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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THE INTEREST OF *AMICI CURIAE*

Central Ohio Coal Company, Consolidation Coal Company, Eastern Associated Coal Corp., Southern Ohio Coal Company, U.S. Coal, Inc., and Windsor Power Coal Company [hereinafter collectively referred to as "*Amici* Employers"] have a very substantial involvement in the operation of coal mines throughout the United States. Last

year, *Amici* Employers collectively produced over sixty-seven million (67,000,000) tons of coal, accounting for a substantial portion of the production of all coal mines in the United States. And, *Amici* Employers provide jobs to approximately sixteen thousand (16,000) coal miners.

Like trucking, coal mining is necessarily a very safety-conscious industry. The Federal Mine Safety and Health Act of 1977 ["Mine Act"], 30 U.S.C. § 801 *et seq.*, contains the statutory federal safety standards applicable to coal mines. Included in the Mine Act is a provision under which temporary reinstatement can be sought for a miner claiming that his discharge resulted from his making a safety-related complaint. 30 U.S.C. § 815(c). The Secretary of Labor ["Secretary"], in conjunction with the Federal Mine Safety and Health Review Commission ["Mine Commission"], is responsible for enforcing the miner discrimination statute. The statute provides that if the Secretary, upon investigation, finds that the discrimination charge was "not frivolously brought," the Mine Commission, "on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the [discrimination] complaint." *Id.*

The Mine Commission recently revised its procedural rules governing temporary reinstatement to provide mine operators an opportunity for an expedited, limited evidentiary hearing before an administrative law judge prior to the issuance of an order of temporary reinstatement. The revision was prompted by the holding of the Sixth Circuit Court of Appeals in *Southern Ohio Coal Co.* v. *Secretary of Labor*, 774 F.2d 693 (1985), *reh. denied and modified*, 781 F.2d 57 (1986), which sustained mine operators' consitutional right to such a hearing.[1] *See*, 51 Fed. Reg. 16,022 (1986), (to be codified at 29 C.F.R. § 2700.44).

Amici Employers acknowledge that the procedures under

[1] *Amici* Southern Ohio Coal Company and U.S. Coal, Inc. were appellees in *Southern Ohio Coal*.

the Mine Act are dissimilar to those utilized under § 405 of the Surface Transportation Assistance Act of 1982 ["STAA"], 49 U.S.C. § 2305. And, *Amici* Employers recognize the long-standing rule of this Court not to formulate a constitutional ruling broader than is required by the precise facts to which it is to be applied. *United States* v. *Raines*, 362 U.S. 17, 21 (1960). But, *Amici* Employers are vitally interested in the instant case inasmuch as the Secretary's sweeping attack on Roadway's constitutional right to a meaningful pre-deprivation hearing could be aimed to transcend the confines of the instant case and adversely implicate the interests of mine operators who are also subject to a temporary reinstatement procedure — albeit under a different statute. To a large extent, this concern arose from the Secretary's characterization of the issue in the instant case as "closely related to the constitutionality of the temporary reinstatement remedy under [the Mine Act]." [Secretary's Jurisdictional Statement, p. 21].

Inasmuch as the Secretary has persisted in substantially distorting and confusing the various interests which must be balanced in order to ascertain the constitutionally mandated procedural safeguards for federal temporary reinstatement procedures, *Amici* Employers believe their views — as another class of large employers subject to a temporary reinstatement procedure — may be of aid in achieving an accurate constitutional analysis of the procedures under § 405 of the STAA. At the same time of course, the appearance of *Amici* Employers is warranted in an effort to avoid any attempt by the Secretary to indirectly debilitate mine operators' recently sustained due process rights by means of a broad-based attack on Roadway's identical rights in this proceeding.

This Brief is filed with the consent of the Secretary and Roadway. [Appendix A and B].

SUMMARY OF ARGUMENT

The overriding question presented by this case is, what process is due an employer *prior* to the Secretary ordering immediate reinstatement of an undesired employee under § 405 of the STAA.

This Court has made clear that the Due Process Clause of the Fifth Amendment to the United States Constitution entitles an aggrieved party to *meaningful* notice and a *meaningful* opportunity to present its case *prior* to the deprivation of a significant property interest. The parties here do not dispute that a temporary reinstatement order implicates a protectible property interest of an employer. Thus, the essence of the inquiry here is to determine what constitutes "meaningful" procedural protection under the flexible concept of due process. And, that determination can only be made properly after a thorough analysis of: the competing interests; and the risk of erroneous deprivation attendant to the particular application of the temporary reinstatement remedy of § 405 of the STAA.

An employer's interest centers on its right and concern of avoiding the substantial impact — on both the operation of its business and its other employees — of compulsory reinstatement of an unsatisfactory employee, through the opportunity, *before* the harm is done, to meet the evidence leveled against it and demonstrate the true nature of the employee's allegations. Absent adequate procedural safeguards, law-abiding employers are subjected to what can be a lengthy — or in the case of § 405, an *indefinite* — period of unjustified "temporary" employee reinstatement which seriously jeopardizes the maintenance of effective business operations.

The public interest in providing prompt reinstatement of employees who have been unlawfully discharged for reporting safety violations — proffered by the Secretary as the principal competing interest to that of the employer — is not impaired simply by requiring that an employer be afforded an

opportunity for a meaningful hearing *prior* to ordering reinstatement. The fear of employer-caused delays espoused by the Secretary and *Amicus Curiae* Teamsters for a Democratic Union can be obviated easily through the use of procedures similar to those with which Congress and the Secretary have substantial experience under other employee protection statutes. Moreover, the validity of the Secretary's vigorous challenge to the short time needed for a meaningful pre-order hearing as destructive of the claimed essence of the effectiveness of § 405 — promptness — is questionable inasmuch as at the same time, the Secretary tolerates an investigation such as the one here which exceeded the statutorily-prescribed time period by nine (9) months. Clearly, at some point during what can be a very lengthy investigatory period — if and when it becomes clear to the investigator that reasonable cause exists to believe a violation has occurred — a short time can be set aside to afford an employer a *meaningful* hearing opportunity.

Just as the balancing of the competing interests support the conclusion that a *pre*-deprivation evidentiary hearing before an impartial decision-maker is warranted, the overwhelming risk of erroneous deprivation inherent in the mechanism for temporary reinstatement under § 405 similarly mandates that procedural safeguard. Section 405 fails to guarantee any procedural protection of an employer's substantial interest in avoiding erroneous compulsory reinstatment of a terminated employee. The statute requires no more than: notification "of the filing of the complaint;" and an "investigation" by the Secretary prior to ordering temporary reinstatement. Such "notice" and the procedure for the Secretary's investigation — which is seriously deficient both in terms of reliability of result and fairness — plainly constitute a grossly inadequate substitute for the constitutional entitlement to meaningful notice and a meaningful opportunity to be heard.

At no point during the course of the investigation is an employer afforded a meaningful opportunity to respond. Pursuant to the investigatory "guidelines" adopted by the

Secretary and contrary to the statutory direction [49 U.S.C. § 2305(c)(1)], the employer routinely is not even contacted until *after* the investigator has concluded that the complainant's allegations establish a *prima facie* violation. Moreover, inasmuch as the investigator is *not* required to disclose even the substance of the evidence compiled, the employer is placed in the untenable position of having to disprove the complainant's case *without* benefit of knowing the claimed evidence which is relied upon by the investigator. The Secretary's "guidelines" are entirely subject to implementation in a manner fully within the discretion of the individual investigator and are otherwise ill-suited to insuring a reliable and impartial decision on the temporary reinstatement issue under § 405. These deficiencies are constitutionally fatal to the procedure.

Moreover, the principle of having the same individual investigate, essentially dictate the decision, and support subsequent post-deprivation litigation against the employer is plainly incompatible with objective adjudication of the temporary reinstatement issue. Absent some procedural regularity and adversarial input in the process of compiling diverse information and making the difficult credibility and veracity judgments inherent in employee discharge cases, the risk of error is plainly substantial. And, such error is not corrected by the subsequent "file review" by the investigator's superiors. The assistance of an adversarial hearing before an impartial adjudicator, complete with a cross-examination opportunity, *prior* to any order of reinstatment is critical to minimizing the extremely high risk of error otherwise faced by an employer under § 405.

Therefore, the requisite thorough analysis of all the factors relevant to a due process inquiry clearly indicates that an employer confronted with the possible reinstatement of a terminated employee is entitled, at a minimum, to the procedural protection which the Court below found to be mandated by the Due Process Clause.

ARGUMENT

THE SECRETARY'S INTEREST IN NOT AFFORDING A MEANINGFUL HEARING PRIOR TO ORDERING TEMPORARY REINSTATEMENT OF AN UNSATISFACTORY EMPLOYEE IS CLEARLY OUTWEIGHED BY: THE SUBSTANTIAL INTEREST OF THE PRIVATE SECTOR EMPLOYER AFFECTED BY THE ACTION; AND THE NEED FOR AND USEFULNESS OF ADDITIONAL PROCEDURAL SAFEGUARDS TO LESSEN THE RISK OF GOVERNMENT ERROR

The constitutional standard against which any government temporary reinstatement procedure must be measured is that established by the Due Process Clause of the Fifth Amendment to the United States Constitution. Inasmuch as there is no dispute that compulsory temporary reinstatement of a discharged employee involves a protectible property interest of an employer [*see*, Brief of Secretary, p. 16], the only question presented by this appeal is, what process is due to protect against an erroneous deprivation of that interest.

All parties agree that the "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'." *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976), quoting *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). Thus, more specifically stated, the Court is being called upon in this case to define the concept of "meaningful" in regard to application of the temporary reinstatement remedy in § 405 of the STAA.

As the Court's previous decisions make clear, due process is a flexible concept, with the measure of procedural protection mandated by the Constitution being dependent upon the specific circumstances and interests involved in the particular deprivation of property. *See, e.g., Mathews*, 424 U.S. at 334. And, a procedural due process analysis requires consideration of three principal factors:

> first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation

> of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.
>
> *Mathews*, 424 U.S. at 335.

In applying the *Mathews* criteria, the Court below quite properly began its analysis with the premise that the dictates of due process require, at a minimum, that notice and a meaningful opportunity to be heard *precede* deprivation of a significant property interest. [J. S. App. 6a].[2] And, the District Court reached its conclusion — that a *meaningful* pre-deprivation hearing opportunity for an employer in the present context must include "an opportunity to present his side and a chance to confront and cross examine witnesses" — *only after* thoroughly considering: the competing interests of the employer and Secretary; and the risk of erroneous deprivation attendant to the government's decision concerning temporary reinstatement under § 405. [J.S. App. 6a-9a].

While the Secretary has protested that "rarely" has this Court required an evidentiary hearing before the government may temporarily deprive an individual of his property [Brief of Secretary, p. 19], *never* before has this Court contrasted a governmental desire not to hold a pre-deprivation hearing with a private employer's interest against erroneous compulsory reinstatement. And, *never* before has this Court considered whether a government investigation of an employee discharge — in which the investigator both dictates the *ex parte* decision on grounds not revealed to the employer and participates in subsequent litigation as an advocate against the employer — satisfies the requirement of notice and a meaningful opportunity to be heard.

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2 References to those portions of the record reprinted in the Secretary's Jurisdictional Statement are denoted [J.S. App. ____]. The record contained in the Joint Appendix is referenced [J.A. ____].

The Secretary apparently has chosen to argue from inapposite precedent rather than meet the obligation to demonstrate in a *real-world* fashion how the balance of the *Mathews* factors — with regard to the *present* circumstances, procedures, and competing interests under § 405 — favors the Secretary's desire *not* to conduct some form of *fair* evidentiary hearing *prior* to ordering temporary reinstatement. *Amici* Employers submit, however, that an accurate focus in this case on the *Mathews* factors makes clear that the Secretary has failed to offer any justifying rationale for the blatant legislative and regulatory disregard of employers' due process rights under § 405; and thus, the statute and its implementing guidelines must be found unconstitutional.

1. Employers Possess A Substantial Interest In Avoiding The Erroneous Reinstatement Of An Employee

The merit of the remedy of reinstatement, when warranted, is not debated here by *Amici* Employers. An employer found to have violated a law for which reinstatement is the mandated remedy has no choice but to accept and adjust to the resultant impact of compulsory reinstatement. Nonetheless, the impact on an employer's business when forced to reinstate a formerly discharged employee cannot be minimized. The private interest in this case — an interest shared by *all* employers — centers on an employer's right and concern in avoiding the substantial impact of government-compelled reinstatement — even on a "temporary" basis — by having the opportunity, *before* the harm is done, to meet the evidence leveled against it and demonstrate that the former employee's allegations of an unlawful discharge are groundless.

Wrongful reinstatement infringes upon an employer's right to remove employees whose conduct impairs efficient operation and to do so with promptness. And, absent adequate procedural safeguards, law-abiding employers are subjected to

what can be a lengthy period[3] of unjustified, "temporary" employee reinstatement which jeopardizes the maintenance of employee efficiency and discipline essential for effective business operation. Moreover, reinstatement so easily gained — without substantiation of discrimination through a *fair* hearing process — may impress upon other employees the apparent lack of necessity of either maintaining a good work ethic or adhering to disciplinary policy in order to maintain their positions. It must be recognized that while a complainant's fellow employees have an interest in a safe environment and remedying unlawful retaliation, those same employees have an equal interest in not being forced to work alongside a person who may be undesirable for any number of reasons which do not contravene any law. The District Court summed up these concerns by embracing the sound reasoning of this Court in *Arnett* v. *Kennedy*, 416 U.S. 134, 168 (1974), which is universally applicable to all employment situations:

> [p]rolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.
>
> [J. S. App. 7a]

[3] In the instant case, nine (9) months elasped between issuance of the prehearing order of temporary reinstatement and the post-hearing recommended order. [Roadway's Motion To Affirm, p. 16]. The period of "temporary" reinstatement under § 405 has *no* limit under the Secretary's interpretation. The Secretary considers the one hundered and twenty (120) day period within which the statute requires a final order to issue as not commencing until *after* the administrative law judge issues a recommended decision. The time expended by the judge in reaching the recommended decision is entirely unregulated. Therefore, considering the range of work habits and caseload of the individual judges, an employer could be exposed to erroneous deprivation from several months to several years. The possible length of the deprivation — indefinite under § 405 — is an important factor in assessing the impact on the interest of an employer. *Mackey* v. *Montrym*, 443 U.S. 1, 12 (1979). In *Barry* v. *Barchi*, 443 U.S. 55, 66 (1979), the temporary suspension of a horse trainer's license was ruled unconsitutional because the government's post-deprivation procedures (although providing for a full post-suspension hearing) failed to insure a *prompt* proceeding *and prompt* disposition of all outstanding issues.

Further, the District Court appropriately recognized that, while the findings of an arbitration board are not given *res judicata* or collateral estoppel effect in a subsequent statutory proceeding [J. S. App. 16a], an employer has a substantial interest in not having an arbitration award upset by a *preliminary* order issued *without first* affording the employer a *meaningful* opportunity to be heard. [J. S. App. 7a].

The Secretary's cavalier attempt to minimize the employer's interest by arguing that an employer is not harmed because it will receive a day's work for a day's pay [Brief of Secretary, p. 26], overlooks every one of the employer, and fellow-employee, concerns described above — and the practical reality of a business operation.

Moreover, in asserting that temporary reinstatement of an unsatisfactory employee creates only an "incremental reduction in the employer's control of his workforce, which involves one employee out of many . . ." [Brief of Secretary, p. 29], the Secretary either misapprehends or is choosing to ignore the integral role played by an individual employee in the collective effort. First, an employee rarely works in an environment segregated from others. Employees interact among themselves and with their supervisors in a working relationship on a frequent basis. Moreover, an employee's individual contribution is vital to the success of the entire enterprise. Correspondingly, the impact on a business of the presence of one unsatisfactory employee impedes the collective effort. *Amici* Employers strongly dispute that, on balance, the asserted "benefit" received by an employer from the labors of an unsatisfactory employee offsets in any realistic way the irreparable harm caused by a *wrongful* temporary reinstatement.

For these reasons, the District Court in the instant case properly concluded that Roadway's interest against being exposed to erroneous reinstatement of an unsatisfactory employee is substantial. [J. S. App. 7a].

2. The Secretary Has Failed To Demonstrate That Congress' Goal Of Promoting Highway Safety By Using Temporary Reinstatement To Remedy Employee Discrimination Is Infringed By Affording An Employer A Meaningful Pre-Order Hearing

Another factor in the *Mathews* consideration involves the governmental interest — including the fiscal and administrative burdens associated with an evidentiary hearing held prior to the issuance of a temporary reinstatement order. The Secretary and *Amicus Curiae*, Teamsters For A Democratic Union ["TDU"], elaborate in detail the importance of highway safety and the Congressional objective of encouraging employee reporting of statutory violations without fear of reprisal by an employer. [Brief of Secretary, pp. 30-35; Brief of TDU, pp. 8-9, 15]. *Amici* Employers fully agree that there is a statutorily-evidenced strong public interest in: highway safety; encouraging employees to report violations; and providing prompt reinstatement of employees who have been discharged for unlawful reasons. However, *Amici* Employers take strong exception to the assertions of the Secretary and TDU that affording an employer a *meaningful pre*-deprivation hearing would "thwart" those goals underlying § 405. [Brief of Secretary, p. 37; see generally, Brief of TDU, pp. 8-9, 15].

Both the Secretary and TDU reason that permitting an employer a meaningful pre-deprivation hearing will provide the employer with a means of delaying reinstatement to the extent of causing intolerably longer periods of unemployment, thereby discouraging employee-reporting. [*Id.*] However, the Secretary and TDU fail to acknowledge that the delay, if any, which would result from affording an employer a pre-order hearing is solely a function of the procedures established by Congress or the Secretary for adapting the temporary reinstatement process to the dictates of due process. An employer plays no role in the timing of the hearing and can be precluded procedurally from causing those delays feared so disastrous by the Secretary and TDU.

The procedure under the Mine Act plainly illustrates how potential delays can be minimized. If the Secretary concludes from investigation that an employee's discrimination complaint was "not frivolously brought," the statute requires the Mine Commission to decide the Secretary's application for temporary reinstatement "on an expedited basis." 30 U.S.C. § 815(c)(2). The now-existing procedure implementing the statute's temporary reinstatement remedy limits an employer to ten (10) days in which to request a preliminary evidentiary hearing on the issue of whether the complaint was frivolously brought. 29 C.F.R. § 2700.44(b) [51 Fed. Reg. 16,024 (1986)]. The procedure then requires the hearing to be held no later than ten (10) days from the employer's hearing request. *Id.* Only if "compelling reasons are shown" may the employer obtain an extension of time. *Id.* The administrative law judge is required to issue an order regarding temporary reinstatement within five (5) days of the close of the hearing. 29 C.F.R. § 2700.44(d) [51 Fed. Reg. 16,024 (1986)]. Although the employer is afforded five (5) days to appeal the order to the Mine Commission, such an appeal does *not* stay the effect of the judge's order unless the Mine Commission directs otherwise. 29 C.F.R. § 2700.44(e) [51 Fed. Reg. 16,024 (1986)].

Moreover, the Secretary has extensive experience in implementing other federal employee-protection statutes under which a constitutional *pre*-order evidentiary hearing is conducted without impeding the goal of expeditious reinstatement. Under the employee-protection provisions of the Energy Reorganization [Atomic Energy] Act of 1974 [42 U.S.C. § 5851], the Clean Air Act [42 U.S.C. § 7622], the Water Pollution Control Act [33 U.S.C. § 1367], the Safe Drinking Water Act [42 U.S.C. § 300j-9(i)], the Toxic Substance Control Act [15 U.S.C. § 2622], and the Solid Waste Disposal Act [42 U.S.C. § 6971], the Secretary is charged with the responsibility of expeditiously handling employee discrimination complaints. 29 C.F.R. § 24.1(b). The corresponding procedure promulgated by the Secretary

minimizes any delay associated with conducting a *pre*-order evidentiary hearing before an administrative law judge. An employer must request a hearing within five (5) days of the Secretary's investigative determination that a violation occurred. 29 C.F.R. § 24.4(d)(3)(i). Following receipt of the employer's request, the administrative law judge is permitted seven (7) days, at most, to schedule the hearing. 29 C.F.R. § 24.5(a). The parties are entitled to only a five (5) day notice of the hearing. *Id.* Because of time constraints imposed upon the Secretary by the statutes, the procedure provides that "no requests for postponement shall be granted except for compelling reasons." *Id.* Finally, the judge is required to issue a recommended decision within twenty (20) days of the close of the evidentiary hearing. 29 C.F.R. § 24.6(a).

Thus, the Secretary's forecast of intolerable employer-caused delays is contradicted by the Secretary's own procedural experience under numerous other employee-protection statutes. Obviously, the health and safety interests promoted by those other statutes are no less important than highway safety. And, there is no suggestion — by Congress, courts, or anyone else — that the goals of those statutes are thwarted by providing an evidentiary hearing *prior* to ordering reinstatement.

The Secretary's over-dramatization of the impact of the short time required for a pre-order hearing under the STAA also rings hollow when considering the Secretary's own procedure currently used to implement the goals of § 405. The procedure defines the sixty (60) day statutory period during which the investigation is supposed to be completed as only "directory." OSHA Instruction DIS. 4A, at IX-7(D)(13). This guideline instructs that "there may be instances when it is not possible to meet the directory period set forth in § 405 (2)(A)[sic]". *Id.* While *Amici* Employers do not dispute the desirability of a thorough investigation, they do question the validity of the Secretary's vigorous challenge to the short time needed for a pre-order evidentiary hearing as destructive of the claimed essence of the effectiveness of § 405 — promptness — when at the same time, the Secretary, by treating the sixty (60) day period as "directory," permitted the time of the investigation to exceed the statute's suggested period of sixty (60) days. [Brief of Secretary, p. 41]. There is clearly no rational explanation for the Secretary's desire to rush in *after* eleven (11) months of investigation and demand *immediate* reinstatement without a hearing.[4]

Under all employee-protection statutes, a complaining employee is faced with some time of unemployment while the responsible agency investigates the complaint. Certainly, at some point during what apparently can be a very lengthy investigatory period — if and when it becomes clear to the investigator that reasonable cause exists to believe a violation has occurred — a short time can be set aside to hold a hearing to allow an employer a *meaningful* opportunity to address the evidence and present its version of the facts.

Inasmuch as lengthy *investigatory* delays clearly are tolerable to the Secretary and any additional delay attendant to conduct a pre-order evidentiary hearing can be procedurally minimized to be negligible in comparison, the obvious question is: what public interest is at stake when a *pre*-order evidentiary hearing is held in these circumstances? Upon full consideration of the circumstances, the Secretary's seeming "interest" is simply the "desire" *not* to have a meaningful hearing before ordering reinstatement. And, that "interest" pales in comparison to an employer's interest in having a meaningful opportunity to defend its discharge of an unsatisfactory employee *before* being compelled to reinstate that employee — even temporarily.

Clearly, the administrative and fiscal burdens associated

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4 And, for those rare emergency cases where some reason *may* exist, provision could be made for a procedure similar to that under Rule 65(b) of the Federal Rules of Civil Procedure. Under such a procedure, if the Secretary could specify the need for immediate reinstatement and the reasons why notice and an opportunity to respond need not be afforded the employer, an administrative law judge could order temporary reinstatement — pending a prompt hearing on the matter.

with affording an evidentiary hearing before an impartial adjudicator are not significant factors in the balance. Not surprisingly, the Secretary makes only passing mention of those factors. [Brief of Secretary, p. 38]. This is *not* a "mass justice" type of case as was the situation confronted in *Mathews*, 424 U.S. at 347, where, in the context of the administration of social security benefits, the Court noted that the expense of constitutionalizing the benefit termination procedures would not be "insubstantial."[5]

In the instant case, the Secretary has not disclosed the number of discrimination complaints that have been filed each year under § 405 or, more significantly, how many *ex parte* orders of temporary reinstatement have been issued. Absent such disclosure by the Secretary of the statistics pertaining to § 405, there is *no* basis on which to predicate a conclusion that any substantial administrative or fiscal burdens would attend affording employers pre-deprivation hearings before impartial adjudicators under the STAA. Moreover, as is the case with avoiding delays, Congress could preclude what it may perceive as additional fiscal and administrative burdens by choosing to model an amended § 405 after the majority of other federal employee-protection statutes. See, pp. 13-14, *supra*.

Regardless of how Congress chooses to implement the requirement of due process in § 405, any burden which might result clearly fails to outweigh the other factors which plainly favor affording an employer *meaningful pre*-deprivation due process.

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[5] Indeed, in 1974 alone, 122,793 hearing requests were received by the Social Security Administration, representing a 300% increase from only four year's earlier. Only 80,779 of those requested hearings were able to be conducted in that year. Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1284, n. 91 (1975). The number of § 405 complaints believed to be meritorious after investigation for which a hearing opportunity would arise most assuredly would be negligible in comparison.

3. A Government Investigation Into The Merits Of A Private Sector Discharge Which Essentially Dictates The Decision Concerning Temporary Reinstatement And Supports Any Resultant Prosecution Of The Alleged Discrimination Violation Creates An Overwhelming Risk Of Erroneous Deprivation

As a final factor, the *Mathews* balancing process focuses on the "risk of an erroneous deprivation of [an employer's] interest through the procedures used [by the Secretary], and the probable value, if any, of additional or substitute procedural safeguards." 424 U.S. at 335. The Secretary has conceded that an employer possesses a constitutional right to some kind of hearing *prior* to being ordered to temporarily reinstate an unsatisfactory employee. [Brief of Secretary, p. 17]. The Secretary, however, has claimed that an investigation, which includes some unregulated contact with the employer, provides all the pre-deprivation process that is due. [Brief of Secretary, pp. 17, 39-40]. *Amici* Employers submit that the Secretary's argument is meritless. A government investigation of a factually complex employee discharge by the individual who essentially dictates the decision concerning temporary reinstatement and who, at the same time, builds the case for and participates in subsequent litigation against the employer plainly cannot satisfy an employer's right to notice and a *meaningful* opportunity to be heard.

An examination of the current § 405 pre-deprivation procedure offers a clear explication of why the government investigatory process is not sufficiently reliable and why, therefore, an evidentiary hearing held before an impartial adjudicator *and* prior to the issuance of a temporary reinstatement order is of substantial value. There should be little dispute that, on its face, § 405 of the STAA fails to guarantee an employer adequate procedural due process prior to an order of temporary reinstatement. The statute only requires that the employer be notified "of the filing of the complaint" and that an investigation by the Secretary be conducted to determine "whether there is reasonable cause to believe that

the complaint has merit." 49 U.S.C. §§ 2305(c)(1) and (2). This procedure provides an employer neither *meaningful* notice nor a *meaningful* opportunity to be heard. And, the internal investigatory "guidelines"[6] relied on by the Secretary to constitutionalize § 405 also fail to offer an employer any semblance of the constitutionally required notice or a *meaningful* opportunity to be heard.

The investigation procedure is the very same as that used to investigate discrimination complaints under OSHA's analogous employee protection statute — § 11(c) [29 U.S.C. § 660(c)]. See, OSHA Instruction DIS. 4A, at IX-5(D)(6). Unlike § 405, however, there is no provision for *ex parte* temporary reinstatement under § 11(c). Instead, if the Secretary concludes from his investigation that a violation of the OSHA statute has occurred, he must bring an action in a United States District Court to obtain an order for reinstatement and backpay. 29 U.S.C. § 660(c)(2). That investigative procedure for OSHA's § 11(c) — which, at the outset, sets the focus for the investigation on building a case *against* the employer [see, *e.g.*, OSHA Instructions DIS. 4A at V-3(D)(1); V-3(D)(2)(c)(2); V-5(D)(3)(b); V-7(D)(6)] — is entirely ill-suited to qualifying as a *meaningful* opportunity to be heard on an unbiased basis as is necessary for proceedings under the STAA's § 405 which does not involve the unbiased forum of a District Court.

The procedure commences with an instruction to the investigator that "[t]he complainant's side of the investigation

[6] The "guidelines" relied upon by the Secretary are not mandated by any regulation or statute. They do not have the force and effect of law, nor do they confer procedural or substantive rights upon individuals. See, *H. B. Zachry Co.*, 1980 OSHD ¶24,196 (1980), *aff'd* 638 F.2d 812 (5th Cir. 1981); *FMC Corp.*, 1977-1978 OSHD ¶22,060 (1977). And, inasmuch as the procedure has changed since the investigation pertaining to the case *sub judice*, there is absolutely no assurance that such procedure will not change again. Moreover, the investigator is not even required to adhere to the "guidelines"; they are just that — guidelines, which the investigator has "individual discretion . . . in implementing." OSHA Instruction DIS. 4A, at V-1(A)(2).

shall be developed as thoroughly as possible." OSHA Instruction DIS. 4A, at V-5(D)(3)(b). And, although § 405(c)(1) of the STAA requires the Secretary to notify the employer of the filing of the complaint *upon receiving* it, the investigatory policies direct the *completion* of the investigation of the complainant's allegations *before* making the initial contact with the employer. See, OSHA Instruction DIS. 4A, at V-5(D)(4). Thus, employers are further prejudiced by being denied an early opportunity to gather and preserve evidence.

By the time initial contact is made with the employer, the investigator already is convinced that the complainant has established a *prima facie* violation — or there would be no reason to contact the employer. At that point, because the "guidelines" do *not* require the investigator to disclose the substance of the evidence compiled, the employer is placed in the untenable position of having to disprove the complainant's case *without* benefit of knowing the claimed evidence which is relied upon by the investigator.[7] This was precisely the situation confronted by Roadway in the present case. [Roadway's Motion To Affirm, pp. 3, n.2, 4].

There can be no fair dispute over the right to know the nature of the evidence on which the administrative agency relies. Friendly, *supra*, 123 U. Pa. L. Rev. at 1283. In

[7] The Secretary has argued that the investigatory "guidelines" include an "implicit . . . obligation" for the investigator to disclose to the employer the substance of the evidence against it. [Brief of Secretary, p. 40, n. 19]. However, recognizing the Secretary's apparent regard for confidentiality [Brief of Secretary, pp. 46-47], it is very unlikely that an investigator will disclose any more than the "guidelines" actually state — *i.e.*, the "substance of the complaint." OSHA DIS. 4A, at V-5(D)(4). In the instant case, the Secretary had to rely on the parties' arbitration proceedings as having provided Roadway with sufficient notice of the evidence against it. The Secretary's resort to inferences from broad and discretionary internal "guidelines" and reliance upon a private arbitration proceeding to satisfy due process highlight not only the deficiencies in the Secretary's procedure but also the fallacy of the Secretary's ultimate proposition that his investigation substitutes as notice and a meaningful opportunity to be heard.

Cleveland Board of Education v. *Loudermill*, 470 U.S. 532, 84 L.Ed.2d 494 (1985), this Court construed the requirement of a meaningful opportunity to respond to include an explanation of the evidence against the respondent. 470 U.S. at ——, 84 L.Ed.2d at 506. Here, the Secretary's procedure does not require the investigator to reveal even the substance of the evidence gathered during the investigation prior to ordering temporary reinstatement. This failure alone plainly invalidates any suggestion that a *meaningful* opportunity to be heard is had during such an investigation.

The risk of error and procedural unfairness arising by application of the Secretary's guidelines are further magnified as the investigation progresses. After the employer is provided with an entirely ineffective opportunity to respond to anything more than the bare charge, the Secretary's policies direct the investigator to give the complainant the *final* word in an effort "to resolve any discrepancies or counter-allegations resulting from contact with the respondent." OSHA Instruction DIS. 4A, at V-7(D)(6). And, the investigation is not to terminate at any stage unless "it can be conclusively shown that a *prima facie* case cannot be developed." OSHA Instruction DIS. 4A, at V-4(D)(2)(c)(2). In the end, the investigator is called upon to prepare a recommendation for disposition of the case. OSHA Instruction DIS. 4A, at VI-3(C)(2)(n). The investigator's conclusions, presumably supported by his investigation file, essentially dictate the *ex parte* decision. Subsequent review by supervisory officials simply consists of weighing the investigator's recommendation "against the evidence available in the file." OSHA Instruction DIS. 4A, at IX-6(D)(9).

This process clearly highlights why the assistance of an adversarial evidentiary hearing before an *impartial* adjudicator *prior* to any order of temporary reinstatement is critical for lessening what otherwise would remain a substantial risk of erroneous deprivation.

The reliability of the investigator's fact-finding, proffered as a meaningful opportunity for the employer to be heard, necessarily must be examined in light of the nature of the inquiry involved. Where the basis for administrative action consists of *objective* or *historical* facts that are within the personal knowledge of the government investigator or readily ascertainable by him, the risk of error is not as likely. *Mackey* v. *Montrym*, 443 U.S. 1, 13-14 (1979). "It is only where the inquiry is 'sharply focused' and 'easily documented' that ex parte administrative investigations are considered reliable." *Mathews*, 424 U.S. at 343-344. But, where the facts are likely to be disputed, pre-deprivation procedural protection is required. *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1, 18 (1978); *Goldberg* v. *Kelly*, 397 U.S. 254, 269-270 (1970).

In *Califano* v. *Yamasaki*, 442 U.S. 682 (1979), this Court examined § 204 of the Social Security Act [42 U.S.C. § 404] pursuant to which there is no recoupment of an erroneous overpayment of benefits if the recipient requests and is granted a waiver of recovery by the Secretary of the Department of Health, Education, and Welfare. The statute provides a waiver for "any person who is without fault if such adjustment or recovery would defeat the purpose of this Subchapter or would be against equity and good conscience." 42 U.S.C. § 404(b). The issue presented was whether an oral hearing opportunity had to precede the HEW Secretary's decision on the recipient's written waiver request. 442 U.S. at 695. And, the Court held that a pre-waiver decision oral hearing was required since the HEW Secretary's assessment of fault, equity, and good conscience "is inherently subject to factual determination and adversarial input." 442 U.S. at 696, *citing*, *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 617 (1974).[8]

In reaching its conclusion, the Court expressly recognized the value of conducting a pre-waiver decision evidentiary hearing before an impartial decision-maker in observing that since the HEW Secretary had implemented the hearing requirement mandated by the lower courts — which included

[8] After concluding that "the nature of the statutory standards [made] a hearing essential" the Court found it unnecessary to also examine the requisites of constitutional due process. 442 U.S. at 693.

the opportunity for the recipient to present "testimony and evidence and cross-examine[ ] witnesses" — thirty percent (30%) of the HEW Secretary's initial determinations had been reversed. *Id.*

> This rate of reversal confirms the view that, without an oral hearing, the Secretary may misjudge a number of cases that he otherwise would be able to assess properly.
>
> . . .
>
> *Id.*

As in the instance of the situation in *Yamasaki*, "questions involved in reinstatement proceedings are 'inherently subject to factual determination and adversarial input'," *Southern Ohio Coal Co.*, 774 F.2d at 693, *quoting*, *Mitchell*, 424 U.S. at 617; therefore, an adversarial evidentiary hearing prior to the reinstatement decision similarly is required.

Nevertheless, the Secretary's procedure applicable here expressly directs the *investigator* to resolve "(q)uestions of credibility and reliability of evidence" as part of his investigation. OSHA Instruction DIS. 4A, at VI-3(C)(2)(1). Moreover, these questions are resolved in the context of an investigation which strives to provide the complainant every opportunity to make his case, including the opportunity for the final word in response to the employer's position — a position which is presented without benefit of knowing the evidence relied upon by the investigator. Even assuming, *arguendo*, the complete neutrality of the Secretary's investigator when compiling diverse information and making judgments regarding credibility and veracity, there plainly is an extremely high risk of error inherent in the Secretary's proffered decision-making process.

Moreover, in light of the procedure utilized by the Secretary, a completely unbiased investigation cannot be so easily presumed. The risk of error is substantially increased under that procedure by the joinder of the investigative, prosecutive, and adjudicative functions within one entity.

The prosecutorial emphasis inherent in the Secretary's "investigative" procedure cannot be overlooked. And, the investigator/prosecutor essentially dictates the decision regarding temporary reinstatement. Simply by working for the agency responsible for enforcing § 405 and being guided by a procedure developed to support successful litigation of discrimination charges, the investigator is almost certain to develop, through investigative zeal, a "will to win" that is incompatible with objective adjudication of the temporary reinstatement issue.[9] Inasmuch as the decision-maker is part and parcel of the enforcing entity (and thus not removed from a suspicion of bias), the greater the need for additional procedural safeguards. And, that need is even more compelling where, as here, the manner of implementing the applicable procedural "guidelines" — including those which may provide some procedural protection for an employer's interest — rests in large part within the discretion of the individual investigator. OSHA Instruction DIS. 4A, at V-1(A)(2). In sum, the field investigation is devoid of any guarantees of procedural regularity which characterize a hearing before an impartial adjudicator.[10]

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9 Significantly, over forty years ago, a provision was included in the Administrative Procedure Act [5 U.S.C. § 554(d)] in direct response to this conflict to provide that "[a]n employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision or agency review. . . ." *See*, Report of the Attorney General's Committee on Administrative Procedure. S. Doc. No. 8, 77th Cong., 1st Sess. 50 (1941).

10 *Amicus Curiae* TDU, although appearing in support of the Secretary, essentially concedes that due process requirements cannot be satisfied by the Secretary's investigation. [Brief of TDU, pp. 16-18]. Instead, TDU argues that an employer, by simply disregarding the Secretary's order of temporary reinstatement, can receive all the process that is due in the course of an enforcement action filed by the Secretary in District Court under § 405(e). [*Id.* at pp. 18-20]. However, that suggested alternative is of questionable viability both in terms of the plain language of § 405 and of placing a party actually seeking relief in a defensive posture before a court. Moreover, a recent decision construing the virtually identical enforcement mechanism under the employee-protection provision contained in the Energy Reorganization Act [42 U.S.C. § 5851(d)] indicates quite clearly that the District Court's enforcement duty is simply ministerial — thus excluding any substance from the judicial consideration of the matter. *Kansas Gas & Electric Co.* v. *Brock*, 780 F.2d 1505, 1514-15 (10th Cir. 1985).

The procedure *following* the investigation does not and cannot correct the errors made during the investigation. The investigator's superiors base their decision *solely* on the investigator's report and recommendation — the same report and recommendation which is not disclosed to the employer to allow for meaningful response. *See*, OSHA Instruction DIS. 4A, at IX-6(D)(9). Moreover, post-investigation review by the Secretary's designees certainly cannot be accepted as satisfying the concern of the need for impartial review inasmuch as those decision-makers then assist in representing the complainant in the post-deprivation proceedings.

The availability of a full post-deprivation hearing under § 405 cannot alone satisfy the requirements of due process. Only where the "potential length or severity of the deprivation does not indicate a likelihood of serious loss *and* where the procedures underlying the decision to act are sufficiently reliable to minimize the risk of erroneous deprivation" is a post-deprivation proceeding constitutionally acceptable by itself. *Memphis Light, Gas & Water Division*, 436 U.S. at 19. As discussed above, the deprivation and harm to an employer's interest in efficiently operating its business caused by temporary reinstatement of an unsatisfactory employee is substantial. And, the length of that deprivation and harm is *indefinite* under the Secretary's interpretation of § 405. *Supra*, pp. 9-11. Finally, the Secretary's unreliable and ill-suited procedure for determining whether reasonable cause supports an order of temporary reinstatement provides very little hedge against an erroneous decision resulting from application of § 405, which itself fails to guarantee any measure of due process for an employer.

In sum, these numerous and serious constitutional defects in the reinstatement procedure under the STAA can only be eliminated by requiring that a *pre*-order evidentiary hearing be afforded an employer under § 405.

CONCLUSION

This Court has emphasized repeatedly that the Due Process Clause entitles the aggrieved party to a meaningful opportunity to present his case *and* have its merits fairly judged. Reflection upon the various interests and circumstances in the instant context leads to but one reasonable conclusion — a "meaningful" opportunity to be heard for Roadway (and other similarly situated employers) must include, at a minimum, an opportunity to know and respond to the evidence against it by confronting and cross-examining witnesses before an impartial decisionmaker and presenting evidence of its own.

An employer — such as Roadway or any of the *Amici* Employers — has a substantial interest against reinstating an unsatisfactory employee — even on a temporary basis. And, that interest expands as that "temporary" period lengthens. Moreover, a procedure like that utilized under § 405 in making the decision regarding temporary reinstatement is wholly unsuited for a valid *ex parte* decision and presents an overwhelming risk of producing an erroneous decision. Thus, additional safeguards are plainly mandated. And, the Secretary's interest in not affording a meaningful pre-deprivation hearing in these circumstances is trivial and has absolutely no relationship to the statutorily evidenced public interest in promoting highway safety — or safety concerns in other business operations. A balancing of the relevant factors clearly indicates that an employer confronted with the possible reinstatement — on a temporary or permanent basis — of a terminated employee is entitled, at a minimum, to the procedural protection which the Court below found to be mandated by the Fifth Amendment to the United States Constitution. In the specific instance of § 405 of the STAA, it is clear that the statute, on its face and as applied, plainly fails to "meet the essential standard of fairness under the Due Process Clause." *Landon* v. *Plasencia*, 459 U.S. 21, 34 (1982).

Accordingly, the judgment of the District Court of the unconstitutionality of the statute should be affirmed.

Respectfully submitted,

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APPENDIX A

Letterhead of U.S. Department of Justice
Office of the Solicitor General

July 1, 1986

Alvin J. McKenna, Esquire
Porter, Wright, Morris & Arthur
Twenty-Fifth Floor
1 Riverside Plaza
Columbus, Ohio 43215-2388

Re: No. 85-1530, *William E. Brock, et al.* v. *Roadway Express, Inc.*

Dear Mr. McKenna:

As requested in your letter of June 27, I hereby consent to the filing of a brief amicus curiae on behalf of the Central Ohio Coal Company, Consolidation Coal Company, Eastern Associated Coal Corporation, Southern Ohio Coal Company, U.S. Coal, Inc. and Windsor Power House Coal Company.

Sincerely,

/s/ Charles Fried
Solicitor General

cc: Joseph F. Spaniol, Jr., Esquire
Clerk
Supreme Court of the United States
Washington, D.C. 20543

APPENDIX B

Letterhead of Fisher & Phillips

July 3, 1986

Alvin J. McKenna, Esquire
Porter, Wright, Morris & Arthur
25th Floor
One Riverside Plaza
Columbus, Ohio 43215-2388

Re: *William E. Brock, et al.* v.
Roadway Express, Inc.
Supreme Court of the
United States
Case No. 85-1530

Dear Al:

I am in receipt of your letter on behalf of Central Ohio Coal Company, Consolidation Coal Company, Eastern Associated Coal Corporation, Southern Ohio Coal Company, U.S. Coal, Inc. and Windsor Power House Coal Company, indicating that you wish to appear as amicus curiae in the captioned matter. This letter is to advise you that the Respondent, Roadway Express, Inc., consents to your appearance as amicus.

By copy of this letter, I am so advising the office of the Solicitor General of the United States.

Very truly yours,

/s/ Michael C. Towers
For FISHER & PHILLIPS

MCT:mhb

cc: Honorable Charles Fried
Solicitor General of the United States